Nos. 91-1111 and 91-1128

In the Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

MERRETT UNDERWRITING AGENCY MANAGEMENT LTD., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether domestic insurance companies forfeited their antitrust immunity under the McCarran-Ferguson Act, 15 U.S.C. 1011-1015, if they conspired with foreign reinsurers that are not subject to regulation by the States.

2. Whether petitioners' alleged activities constituted a boycott for purposes of the McCarran-Ferguson Act.

3. Whether principles of comity require the dismissal of certain claims against the foreign reinsurers.

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INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcing the federal antitrust laws. Thus, it has a significant interest in both the scope of the antitrust exemption conferred by the McCarran-Ferguson Act and the application of principles of comity in antitrust cases.

STATEMENT

Respondents—19 States and numerous private parties—brought these consolidated actions against various primary insurers, reinsurers, insurance underwriters and brokers, and two insurance associations. Respondents allege that petitioners violated the federal antitrust laws, as well as state laws, by engaging in a conspiracy to coerce other insurance companies to alter the terms on which they sell insurance.

1. a. Commercial general liability (CGL) insurance protects the insured against the risk of liability to third parties for personal injuries or property damage. "Primary" insurers sell CGL insurance directly to businesses, nonprofit groups, and government entities. "Reinsurers" sell insurance to primary insurers. CGL insurers typically buy reinsurance for a significant portion of their risks. Reinsurance protects primary insurers from catastrophic losses, and also reduces the level of financial reserves that they are required to maintain. J.A. 9, 10, 16, 17, 18.[1]

For many years, primary insurers in the United States sold CGL insurance mainly on an "occurrence" basis. An occurrence policy covers claims whenever they are made, so long as they are based on incidents that occurred while the policy was in effect. An "occurrence" policy differs significantly from a "claims-made" policy, which covers only claims made during the policy period. Some claims-made policies include a retroactive date provision, which further restricts coverage to claims based on incidents that occurred after a specified date. For many years, CGL insurance covered "sudden" or "accidental" pollution

[1] Unless otherwise noted, references in this brief to respondents' allegations refer to the California complaint, J.A. 5-56. The allegations of the Connecticut complaint, J.A. 57-102, are generally similar to those of the California complaint. In this brief, "H. Br.," "M. Br.," and "S. Br." refer, respectively, to the briefs on the merits submitted to this Court by the Hartford petitioners, the Merrett petitioners, and the Sturge petitioners. References to "Pet. App." are to the Hartford petition appendix, No. 91-1111.

risks and obliged insurers to pay the full legal costs of defending a claim. J.A. 8, 23-35; Pet. App. 9a-10a.

In the early 1980s, petitioner Insurance Services Organization (ISO) undertook a revision of its 1973 CGL occurrence form.[2] Petitioner Hartford Fire Insurance Company, a leading primary insurer, tried to persuade ISO to replace its occurrence form with a claims-made form that included a retroactive date provision, and to eliminate coverage of sudden and accidental pollution and full payment of defense costs. Other primary insurers rejected Hartford's proposals. In March 1984, ISO filed with state insurance regulators standard CGL forms for both occurrence and claims-made insurance. Both types of policies covered sudden and accidental pollution damage and legal defense costs. The claims-made policy did not include a retroactive date provision. J.A. 22-24.

b. In response to ISO's action, petitioners allegedly engaged in a conspiracy to force other insurers to stop offering CGL insurance on terms that were objectionable to petitioners. After ISO filed the March 1984 forms, Hartford and General Re, the largest American reinsurer, met and agreed to "coerce ISO to adopt" Hartford's demands, or "failing that, 'derail' the entire ISO CGL program." J.A. 24. At General Re's instigation, members of the Reinsurance Association of America (RAA), a trade association of domestic reinsurers, "agreed to boycott the 1984 ISO forms unless a retroactive date was added to the claims-made form, and the pollution exclusion and a defense cap were added to both forms." J.A. 15, 25. RAA implemented the agreement by telling ISO that RAA "members would not provide reinsurance for coverages written on the 1984 ISO CGL forms." J.A. 25. Loss of reinsurance presented a significant threat to primary insurers.

[2] ISO is an association of about 1,400 domestic property and casualty insurers that collects statistical data, estimates insurance risks, develops standardized policy forms, and files the standardized forms with state insurance departments. J.A. 19; H. Br. 3.

Petitioners Hartford, Aetna, CIGNA, and Allstate allegedly recruited various London reinsurers to join the boycott of uncooperative American primary insurers.[3] J.A. 25-27. At an ISO Executive Committee meeting on September 20, 1984, "the foreign and domestic reinsurer representatives presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance." J.A. 29. After this meeting, ISO withdrew the 1984 CGL forms and filed a new claims-made form with state insurance regulators that included a retroactive date and excluded all pollution coverage. ISO also filed a new occurrence form that excluded pollution coverage. *Ibid.*

Even after ISO withdrew the 1984 forms and submitted revised forms to the States, a group of Lloyd's reinsurers and others allegedly continued to employ boycotts and coercion to force complete elimination of ISO's CGL occurrence form. Lloyd's reinsurers collectively refused to write new reinsurance treaties or to renew long-standing treaties unless U.S. primary insurers switched from the occurrence form to the claims-made form.[4] It was announced that "Lloyd's of London was withdrawing entirely from the business of reinsuring primary U.S. insurers who wrote on the occurrence form." J.A. 30-31. Lloyd's reinsurers also revised reinsurance treaties to cut off reinsurance for claims filed after a specified "sunset date." *Ibid.*

[3] The London reinsurers included several at Lloyd's of London. Lloyd's is a marketplace or exchange where syndicates (separately capitalized, independently operated groups of investors) transact their business. A Lloyd's policy may be underwritten by dozens of individual syndicates, each sharing a portion of the risk. Lloyd's provides North American consumers with both insurance and reinsurance. Respondents allege that approximately half of Lloyd's casualty business involves North American risks. J.A. 11, 17.

[4] A reinsurance "treaty" is a contract by which a primary insurance company transfers to a reinsurer a portion of a category of risks which the reinsurer obligates itself to cover during the term of the treaty. The treaty period is usually one year. J.A. 10, 17.

In mid-1987, ISO ended its support of the 1973 CGL occurrence form, including data collection and actuarial services. Since most ISO members could not afford to gather the data needed to continue using the 1973 occurrence form, that form has fallen from use. In addition, ISO responded to pressure from domestic and London reinsurers and others by developing standardized policy language for CGL excess and umbrella forms that conforms to the limitations of the revised CGL forms. The revisions apparently were intended to prevent policyholders from substituting excess and umbrella insurance for the discontinued forms of CGL insurance. J.A. 33-34.[5]

2. The district court dismissed the complaints. Pet. App. 33a-84a. It concluded that the challenged conduct was immune from the federal antitrust laws under the McCarran-Ferguson Act, 15 U.S.C. 1011-1015. Pet. App. 45a-47a. The court held that the challenged activities were part of the "business of insurance" and were "regulated by State law" through licensing of ISO, state approval of policy forms, and state unfair insurance trade practice statutes. *Id.* at 47a-50a. In addition, the court held that petitioners' alleged conduct was not within the "boycott" exception to McCarran-Ferguson immunity, because petitioners did not refuse to deal on any terms, nor did they go "beyond the making and implementation of agreements to do business only on terms acceptable to the participant." *Id.* at 50a-57a.

The district court further held that the complaint alleged a direct, substantial, and reasonably foreseeable

[5] Respondents also allege that the London reinsurers boycotted pollution liability coverage by jointly agreeing to exclude all such coverage from casualty reinsurance treaties. J.A. 31-32. In addition, respondents allege a boycott of property pollution insurance and reinsurance by "retrocessional" insurers, who insure reinsurers. J.A. 34-35.

impact on U.S. commerce, and thus established subject matter jurisdiction. Pet. App. 65a-67a, 73a-74a. Applying the multi-factor test adopted in *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), however, the court concluded that principles of comity required dismissal of three counts (Counts 5, 6, and 8 of the California Complaint) that assert claims against London reinsurers and unnamed co-conspirators. The court concluded that application of U.S. antitrust laws to the conduct alleged in those counts would lead to a significant conflict with British law and policy, and that the other *Timberlane* factors did not outweigh this conflict. Pet. App. 75a-83a.[6]

3. The court of appeals reversed. Pet. App. 1a-32a. It agreed with the district court that reinsurance is part of the "business of insurance" for purposes of the McCarran-Ferguson Act, Pet. App. 18a, but concluded that petitioners were not entitled to immunity under that Act for two independent reasons. First, the court held that regulation of foreign reinsurance is beyond the jurisdiction of the States, and "consequently, McCarran-Ferguson Act immunity does not attach to the foreign defendants." *Id.* at 20a. Although the U.S. primary insurers, reinsurers, and insurance brokers are subject to state regulation and "therefore prima facie immune," the court concluded that the domestic petitioners lost that immunity when they conspired with foreign reinsurers that are not subject to state regulation. *Ibid.*

Second, the court held that petitioners' alleged conduct falls within the exception to the McCarran-Ferguson immunity for acts of "boycott, coercion, and intimidation." Pet. App. 20a-25a. The court noted that Hartford allegedly enlisted domestic and foreign reinsurers "to compel capitulation" by the boycotted group—ISO and primary insurers that refused to go along with petitioners' demands. *Id.* at 22a. The court rejected the district court's view that respondents had to show a refusal to deal on any terms, noting that "the evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms." *Ibid.*

[6] The district court also held that petitioners were immune under the state action doctrine to the extent that respondents' allegations concern actions related to development of the CGL forms. Pet. App. 59a-63a. But the court rejected petitioners' argument that respondents lacked antitrust standing. *Id.* at 65a-67a. Because it dismissed all the federal claims, the court also dismissed the pendent state law claims. *Id.* at 83a.

The court of appeals agreed with the district court that the court had subject matter jurisdiction of the three claims (Cal. Compl. Counts 5, 6, and 8) naming only British parties acting in the United Kingdom. Pet. App. 27a-28a. It then applied the *Timberlane* comity analysis. Like the district court, it concluded that application of the antitrust laws to the London reinsurance market would lead to significant conflict with British law and policy. But the court of appeals concluded that five additional factors pointed to retention of jurisdiction: nationality and location of the parties; enforceability of decrees; relative national significance of economic effects; purpose to affect U.S. commerce; and foreseeability of such effects. These factors, the court of appeals concluded, significantly outweighed the one factor favoring abstention. *Id.* at 27a-32a.[7]

SUMMARY OF ARGUMENT

1. The court of appeals erred in concluding that a domestic insurance company automatically loses its anti-

[7] The court of appeals affirmed the district court's ruling that respondents have standing, Pet. App. 19a-21a, and reversed the district court's state action ruling, *id.* at 29a-30a. This Court excluded those issues from its limited grant of certiorari. They are addressed in the brief amicus curiae we filed at this Court's invitation at the petition stage. See U.S. Br. 16-22.

trust immunity under the McCarran-Ferguson Act when it acts in concert with a "non-exempt entity" such as a foreign reinsurer. The McCarran-Ferguson immunity applies to the "business of insurance to the extent that such business is * * * regulated by State law." 15 U.S.C. 1012(b). Accordingly, the analysis should focus on the nature of the *activity* at issue rather than the nature of the *entities* involved in that activity.

Although that aspect of the court of appeals' reasoning was flawed, the court reached the correct result. McCarran-Ferguson confers no antitrust immunity on "boycott[s], coercion, or intimidation." 15 U.S.C. 1013(b). Consequently, if, as the court of appeals also held, petitioners are alleged to have engaged in conduct that falls within the boycott exception to McCarran-Ferguson immunity, their conduct is subject to the federal antitrust laws without regard to whether it was "the business of insurance" or "regulated by state law."

2. Respondents' complaints allege that petitioners engaged in a scheme of "boycott, coercion, or intimidation" within the meaning of McCarran-Ferguson. Agreements among insurers to fix rates or terms of coverage are entitled to antitrust immunity when regulated by the States. But the complaints do not allege simple agreements on the rates and terms that the parties would offer. Instead, respondents allege that petitioners agreed to compel other primary insurers to adopt policy terms that those insurers did not wish to adopt, by preventing the dissenters from obtaining reinsurance.

The alleged conduct was a McCarran-Ferguson boycott. Primary insurers "enlist[ed] * * * third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group." *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 544-545 (1978). The alleged activity was also an "attempt[] by members of the insurance business to force other members to follow the industry's private rules and practices." *Id.* at 565

(Stewart, J., dissenting). Petitioners' alleged conduct is strikingly similar to the insurance boycott condemned in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). In that case, denial of reinsurance was the principal weapon used to enforce uniform insurance rates.

Petitioners' contention that a McCarran-Ferguson boycott is limited to absolute refusals to deal is untenable. Congress expressly created an exception to the McCarran-Ferguson immunity for "any * * * act of boycott, coercion, or intimidation." 15 U.S.C. 1013(b). "Coercion" and "intimidation" plainly include the use of power to compel the victim to do something—*i.e.*, a conditional refusal to deal. In addition, a Sherman Act "boycott" does not require an absolute refusal to deal. If the boycott exception were limited to absolute refusals to deal, McCarran-Ferguson would immunize virtually any form of joint coercive activity, so long as insurance companies sought merely to "discipline" their victims rather than drive them out of business. For similar reasons, a McCarran-Ferguson boycott includes schemes in which the enforcer is willing to deal with the instigators and the victims on equal terms.

3. Principles of comity do not require dismissal of respondents' claims that London-based reinsurers violated the Sherman Act by agreeing not to sell reinsurance to certain primary insurers in the United States. The courts below correctly concluded that they had subject matter jurisdiction over these claims. The Sherman Act expressly applies to acts "in restraint of trade or commerce * * * with foreign nations." 15 U.S.C. 1, 2. In addition, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, makes it clear that Congress intended the Sherman Act to apply to restraints that have a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce. Respondents have alleged such an effect in this case.

We agree with the court of appeals that principles of comity are properly invoked in antitrust cases even though the U.S. court has subject matter jurisdiction. The comity doctrine was already established when Congress enacted the Sherman Act, and the enactment history of the FTAIA indicates that Congress has not countermanded the federal courts' ability to employ principles of comity. The seven factors set out in the Ninth Circuit's decision in *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (1976), provide a useful approach to analyzing questions of comity.

In applying the *Timberlane* factors, we believe the courts below erred in finding that application of U.S. antitrust law would create a conflict with foreign law. In our view, a conflict for comity purposes exists only if (1) a foreign government has directed the defendants to engage in the disputed conduct, or (2) the defendants would have frustrated clearly articulated policies of the foreign government if they had not engaged in the disputed conduct. That standard is not met here. In any event, the court of appeals correctly concluded that other relevant factors support the exercise of jurisdiction and outweigh any possible conflict.

ARGUMENT

I. AN INSURANCE COMPANY DOES NOT FORFEIT ITS IMMUNITY UNDER THE McCARRAN-FERGUSON ACT MERELY BY ACTING IN CONCERT WITH NON-EXEMPT ENTITIES

Petitioners in No. 91-1111 (the Hartford petitioners) contend (H. Br. 15-24) that the court of appeals erred in concluding that they are not entitled to McCarran-Ferguson immunity because they allegedly conspired with foreign reinsurers that are not subject to regulation by the States. The court of appeals reasoned that "[m]embership of an exempt entity [*i.e.*, a domestic insurer] in a conspiracy with nonexempt entities [*i.e.*, foreign reinsurers] makes the exempt entity liable." Pet. App. 20a. The court therefore concluded that "the domestic defendants' immunity [under McCarran-Ferguson] was lost when they conspired with the foreign defendants." *Ibid.* Although we agree with petitioners that the court of appeals' brief discussion of immunity "forfeiture" is analytically flawed, the court's error had no effect on the judgment.

1. By its terms the McCarran-Ferguson Act exempts from the federal antitrust laws "the business of insurance to the extent that such business is * * * regulated by State law." 15 U.S.C. 1012(b). The language of the statute focuses on the nature of the activity at issue—whether it is "the business of insurance"—rather than the nature of the entity at issue. See *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1969) (Act "refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance'"); see also *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 211 (1979). Consequently, the focus of analysis should be on (1) whether a particular activity is part of the business of insurance, and (2) whether the activity is regulated by state law.[8]

We agree with petitioners that when primary insurers merely agree on the insurance rates and forms that they plan to offer, they are engaged in "the business of insurance." So long as this activity is regulated by the States, it is immune from the federal antitrust laws under McCarran-Ferguson. If primary insurers consult with domestic or foreign reinsurers to determine whether the reinsurers would be willing to provide reinsurance under the proposed forms or rates, that interaction does not,

[8] The language of McCarran-Ferguson differs from the language of other federal statutes that confer antitrust immunity. For example, the Capper-Volstead Act confers immunity on "[*p*]*ersons* engaged in the production of agricultural products." 7 U.S.C. 291 (emphasis added).

without more, strip the primary insurers of antitrust immunity. Congress understood that consultation between primary insurers and reinsurers, including foreign reinsurers, is common. See, *e.g.*, H.R. Rep. No. 873, 78th Cong., 1st Sess. 9 (1943) ("Knowledge in advance of what rates and policies will be, is desirable * * *. This is particularly true in the case of reinsurance * * *. No company could safely agree in advance to reinsure, unless it knew what the terms of its obligation would be."); *Joint Hearing on S. 1362, H.R. 3269, and H.R. 3270 Before the Subcomms. of the Comms. on the Judiciary*, 78th Cong., 1st Sess. 116 (1943) (Joint Hearing) (statement of Rep. Hancock) ("The necessity for * * * agreement upon rates in advance was made clear in the matter of reinsurance."). Accordingly, the court of appeals was wrong to conclude that the domestic insurers lose their antitrust immunity merely by including foreign reinsurers in agreements that would otherwise be immune.[9]

2. Although the court of appeals' reasoning is flawed, its judgment is correct. McCarran-Ferguson confers no antitrust immunity on "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. 1013(b). No State may authorize any boycott, coercion, or intimidation; such acts or agreements remain

[9] Of course, the challenged activity is not immune under McCarran-Ferguson unless it is "regulated by State law." 15 U.S.C. 1012(b). The insurance industry has long recognized that there may be no McCarran-Ferguson immunity for agreements among foreign or domestic reinsurers on the rates and terms of reinsurance, because such agreements typically are not subject to state regulation. See Havens & Theisen, *The Application of United States and EEC Antitrust Laws to Reinsurance and Insurance Pooling Arrangements*, 54 Antitrust L.J. 1299, 1303-1309 (1986); Aldrich, *Regulation, Accounting, and Statistics*, in *Reinsurance* 615, 621-622 (Robert Strain ed. 1980); ABA, *Report of the Commission to Improve the Liability Insurance System* 25 (1989); Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, in 16 Forum 1038, 1055 (1981).

fully subject to the antitrust laws. See S. Rep. No. 20, 79th Cong., 1st Sess. 3 (1945); H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945) ("at no time are the prohibitions in the Sherman Act against any [agreement or] act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force and effect"); 91 Cong. Rec. 480-481 (1945) (statement of Sen. Ferguson) (state law that "undertook to authorize a boycott, a coercion or an intimidation * * * would be clearly void."). See also *id.* at 479, 1443, 1481. As we discuss below, see pp. 13-22, *infra*, respondents have alleged that petitioners engaged in "boycott, coercion, or intimidation" within the meaning of McCarran-Ferguson. Accordingly, the Act does not afford a basis for dismissing respondents' antitrust claims.[10]

II. PETITIONERS' ALLEGED CONDUCT WAS "BOYCOTT, COERCION, OR INTIMIDATION" WITHIN THE MEANING OF THE McCARRAN-FERGUSON ACT

The Hartford petitioners contend (H. Br. 24-50) that respondents' complaints do not allege any "boycott, coercion, or intimidation" within the meaning of McCarran-Ferguson. We disagree. Petitioners' arguments rest on an unduly narrow view of the boycott exception to Mc-

[10] Respondents' claim that petitioners conspired to restrain trade in the markets for commercial umbrella and excess insurance does not specifically allege that petitioners engaged in boycott, coercion, or intimidation in those markets. See J.A. 46-47. But respondents allege that petitioners' conspiracy to alter the terms of excess and umbrella insurance was intended to "conform to the revised ISO CGL forms," and thereby prevent policyholders from substituting excess or umbrella insurance for the discontinued types of CGL insurance. J.A. 34. We therefore believe that the complaints adequately allege that the agreements concerning excess and umbrella insurance were in aid of the boycott against competing insurers.

Carran-Ferguson immunity and of the allegations in respondents' complaints.[11]

1. a. Congress enacted the McCarran-Ferguson Act in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (*SEUA*). Prior to *SEUA*, it generally had been assumed that "[i]ssuing a policy of insurance is not a transaction of commerce." *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869). *SEUA* held that "the business of insurance is interstate commerce, and that the Congress which enacted the Sherman Act had not intended to exempt the

[11] We express no view on the merits of this case. Because the action was dismissed on the pleadings, respondents' allegations must be taken as true. *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 534 (1978). In 1987, the Antitrust Division of the Department of Justice concluded that the primary cause of the crisis in property-casualty insurance was "unanticipated changes in the manner in which tort liability has been established and damages assessed." Antitrust Div., U.S. Dep't of Justice, *The Crisis in Property-Casualty Insurance*, in Tort Policy Working Group, *An Update on the Liability Crisis* App. 1 (1987). Our general assessment of the central cause of the insurance crisis does not, of course, rule out the possibility of specific instances of collusion.

We also intend no criticism of the district court's use of judicial management techniques to require the parties to focus their contentions and resolve as many legal and factual issues as possible without trial. On the contrary, we strongly endorse the use of such techniques to streamline antitrust litigation.

In addition, as we explain in our brief at the petition stage (at 14-16), petitioners' conduct may have been entirely lawful even if it is not immune under McCarran-Ferguson. Further development of the facts may reveal that petitioners' alleged activities are subject to analysis under the rule of reason rather than the *per se* rule. Petitioners would have an opportunity to make "plausible arguments that [the challenged practices] * * * were intended to enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985). In that case, *per se* condemnation would be warranted only if it could be shown that the "likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote." *Ibid.*

insurance industry from its coverage." *Royal Drug*, 440 U.S. at 217.

The McCarran-Ferguson Act made clear that the States may regulate insurance companies without fear of Commerce Clause attack. *Royal Drug*, 440 U.S. at 217-218 & nn.16, 18; *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 429-431 (1946). The Act also conferred a limited exemption from the federal antitrust laws. The exemption applies only to "the business of insurance to the extent that such business is * * * regulated by State Law," 15 U.S.C. 1012(b), and only to activity that is not an "act of boycott, coercion, or intimidation," or an "agreement to boycott, coerce, or intimidate." 15 U.S.C. 1013(b).[12]

b. This Court addressed the scope of the boycott exception to McCarran-Ferguson immunity in *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531 (1978). In *Barry*, four medical malpractice insurers agreed that three of them would not sell malpractice insurance to policyholders of the fourth, in order to force the policyholders to accept "claims made" coverage in place of "occurrence" coverage. 438 U.S. at 535. The Court held that the boycott exception was not limited to "only those combinations which target *competitors* of the boycotters." *Id.* at 542. The Court observed that "[t]he language of § 3(b) is broad and unqualified; it covers 'any' act or agreement amounting to a 'boycott, coercion, or intimidation.'" *Id.* at 550. The Court also noted that "Congress * * * employed terminology that evokes a tradition of meaning, as elaborated in the body of decisions interpreting the Sherman Act," and that "[i]t may

[12] The House of Representatives initially passed a bill that would have conferred a blanket antitrust exemption on the insurance industry. See *Royal Drug*, 440 U.S. at 219 & n.20. Because Congress ultimately *rejected* that approach, petitioners' citations (H. Br. 19-20, 32-34) to the legislative history of the initial House bill (H.R. 3270) must be viewed with great caution.

be assumed * * * that Congress intended this language to be read in light of that tradition." *Id.* at 541. Drawing on its Sherman Act jurisprudence, the Court stated that "[t]he generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting [the aid of] others to withhold, patronage or services from the target." *Ibid.* And the Court concluded that "[t]he enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott." *Id.* at 544-545.[13]

Although the dissenting Justices in *Barry* concluded that the boycott exception should not be applied to combinations that target consumers, they had no difficulty in concluding that a boycott includes "attempts by members of the insurance business to force other members to follow the industry's private rules and practices." 438 U.S. at 565 (Stewart, J., dissenting). Thus, every Member of the Court in *Barry* agreed that the boycott exception applies to "any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them." 91 Cong. Rec. 1480, 1485 (1945) (statement of Sen. O'Mahoney).[14]

[13] Contrary to petitioners' suggestion (H. Br. 27-29), *Barry* did not hold or suggest that a Sherman Act boycott is not necessarily a McCarran-Ferguson Act boycott. Rather, the Court observed that not all conduct that violates the "prohibitions" of the Sherman Act (including price-fixing) is a boycott. 438 U.S. at 545 n.18.

[14] Senator O'Mahoney explained:

> The vice in the insurance industry * * * was * * * that there was in the industry a system of private government which had been built up by a small group of insurance companies * * *. These private groups sought, by the imposition of penalties, by writing rules and regulations, and by holding secret trials * * * to enforce * * * regulations for the insurance business which they wrote themselves in their wholly private and exclusive associations. * * * [T]his conference report represents a tremendous gain because it outlaws completely all steps by which small groups have attempted to establish themselves in control of the * * * business of insurance.

91 Cong. Rec. 1480, 1485 (1945).

2. a. Contrary to petitioners' contentions (H. Br. 37-43), respondents' complaints do not allege mere "agreement[s] to fix rates and terms of coverage." 438 U.S. at 553. Petitioners' alleged agreements were not limited to rates and terms of insurance that the parties to the agreement proposed to offer. Rather, petitioners allegedly agreed to force insurance companies that were *not* parties to the agreements to accept terms that those companies did not wish to adopt by denying them access to reinsurance except on those terms. In other words, Hartford and its allies allegedly conspired to prevent Hartford's competitors from offering the type of insurance that Hartford did not want to offer. Petitioners' general references to "agreements on terms and conditions" simply ignore this important difference. Similarly, petitioners' assertion (H. Br. 40) that the reinsurers made a unilateral decision not to reinsure the 1984 forms ignores respondents' allegations that the reinsurers were enlisted by Hartford and other primary insurers as part of a conspiracy to coerce recalcitrant primary insurers to abandon the broader types of CGL coverage.

b. Petitioners' alleged conduct falls squarely within the exception to McCarran-Ferguson immunity for "boycott, coercion, or intimidation." By enlisting reinsurers to withhold reinsurance from competing primary insurers, Hartford pressured its competitors and the ISO into capitulating and adopting the more restrictive terms that Hartford demanded. The Hartford petitioners thus "enlist[ed] * * * third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group." *Barry*, 438 U.S. at 544-545. In addition, peti-

tioners' alleged activity was an "attempt[] by members of the insurance business to force other members to follow the industry's private rules and practices." *Id.* at 565 (Stewart, J., dissenting). See *In re Workers' Compensation Insurance Antitrust Litigation*, 867 F.2d 1552, 1560-1567 (8th Cir.) (boycott exception applies to enforcement of agreement by excluding non-cooperating insurers from association, membership in which is necessary to participate in market), cert. denied, 492 U.S. 920 (1989); P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 210.2, at 123 (Supp. 1991) ("'A [concerted] refusal to deal except [on specified terms], without more' is exempt," but such a refusal becomes "a nonexempt boycott as soon as the cartel members attempt[] to coerce recalcitrant members.").

As petitioners recognize (H. Br. 35), "the boycott exception is properly construed against the background of *SEUA*." Indeed, the Court's opinion used the critical statutory words—"boycotts together with other types of coercion and intimidation"—to describe SEUA's activity. See SEUA, 322 U.S. at 535. Hartford's use of reinsurance as a weapon to force competing insurers to change their policy terms is tellingly similar to the restrictive practices at issue in *SEUA*. SEUA established insurance rates and enforced them: members agreed to adhere to the rates, and deviations were investigated and punished by fines, with expulsion a final penalty. *Id.* at 535-536; 91 Cong. Rec. 1485-1486 (1945) (statement of Sen. O'Mahoney); *Joint Hearing* at 45-48 (statement of Att'y Gen. Biddle); *id.* at 192-193 (statement of Robert Hyder, Missouri Ass't Att'y Gen.). SEUA's principal enforcement weapon was denial of reinsurance. *SEUA*, 322 U.S. at 535 ("Companies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks."); *Joint Hearing* at 48 (statement of Attorney General Biddle) ("The heavy club used by [*SEUA*] to police their rating agreements and to obtain adherence of competitors to such agreements [was] reinsurance.").

c. The Hartford petitioners contend (H. Br. 29-32, 36-37) that their alleged activities were not a McCarran-Ferguson boycott because the reinsurers stopped short of an absolute refusal to deal on any terms with the targeted primary insurers. That contention is untenable.[15]

First, petitioners ignore the language of the statute, which provides that the federal antitrust laws shall apply not only to boycotts, but also to "any * * * act of * * * coercion[] or intimidation." 15 U.S.C. 1013(b). Acts of "coercion" or "intimidation" plainly include acts intended to compel the target of the boycott to deal on specified terms. Indeed, "coercion" and "intimidation" ordinarily refer to the use of power to compel the victim to do something—*i.e.*, a conditional, rather than an absolute, refusal to deal.[16]

Second, petitioners' contention is inconsistent with the traditional definition of "boycott" under the Sherman Act. An antitrust boycott does not require an absolute refusal by the boycott "enforcer" to deal on any terms. See, *e.g.*, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209, 213 (1959) (some boycotting manufacturers and distributors continued to deal with target, although not on the same terms as with the target's competitor, who was part of the conspiracy); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, 608 (1914) (boycotted wholesalers could end retailers' boycott by agreeing not to sell in competition

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[15] Petitioners themselves ultimately concede, in a footnote (H. Br. 32 n.14), that an absolute refusal to deal is not a necessary element of a McCarran-Ferguson boycott, but instead is merely "a probative factor."

[16] "Coercion" is the "use of physical or moral force to compel to act or assent"; to "coerce" is "to compel to an act or choice by force, threat, or other pressure." *Webster's Third New International Dictionary* 439 (1986). "Intimidation" is the "act of intimidating"; "intimidate," in turn, means "to compel to action or inaction by threats." *Id.* at 1184.

with retailers); 9 E. Kintner & J. Bauer, *Federal Antitrust Law* § 70.12(B), at 245-246 (1989).

Third, just as in this case, the boycott in *SEUA* was a conditional, rather than an absolute, refusal to deal. The purpose of the boycotts in *SEUA* was not to drive competitors out of business, but rather to "force non-member insurance companies into the conspiracies." 322 U.S. at 535. The boycotters were willing to reinsure primary insurers provided they joined the organization and followed its rules. See *Joint Hearing* at 335 (statement of Edward Williams, President, Insurance Executives Ass'n) ("[T]he companies that want to come into the Interstate Underwriters Board can come in there. I do not know of any company that is turned down.").

Fourth, petitioners' restrictive interpretation would gut the boycott exception. If the exception were limited to absolute refusals to deal, McCarran-Ferguson would immunize virtually any form of joint coercive activity, so long as the insurers engaging in coercive tactics sought only to "discipline" their competitors rather than to drive them completely out of business through an absolute refusal to deal on any terms. Congress plainly did not intend the boycott exception to have so narrow a scope.

Barry provides no support for the view that a McCarran-Ferguson boycott must involve an unconditional refusal to deal. In *Barry*, the Court considered whether a McCarran-Ferguson boycott includes boycotts targeting *consumers*. Since insurers generally are permitted by the Act to agree on terms and rates offered to consumers, the Court was careful to distinguish the boycott in *Barry* from a simple agreement as to insurance terms and rates. The Court did not hold or suggest that an absolute refusal to deal is a necessary element of a McCarran-Ferguson boycott, particularly one aimed at competitors.[17]

[17] Petitioners contend (H. Br. 29-30) that Congress intended to limit the boycott exception to absolute refusals to deal because such refusals "eliminate[] competition on matters other than terms and conditions of insurance." *Id.* at 29; see *Barry*, 438 U.S. at 553 (boycott "denied policyholders the benefits of competition in vital matters such as claims policy and quality of service."). But the boycott exception is "broad and unqualified," 438 U.S. at 550; there is no "exception to the exception" for boycotts that eliminate competition only on rates and terms. Moreover, a conditional refusal to deal may be used as a device to eliminate competition on matters other than rates and terms.

d. In their brief on the merits, the Hartford petitioners argue (H. Br. 32 n.14, 38-39) for the first time that there is no McCarran-Ferguson boycott if the "enforcer" is willing to deal with both the instigators and their victims on the same terms. That contention, for which petitioners cite no authority, is contrary to the Court's condemnation of the boycott designed to enforce industry-imposed rules against "style piracy" in *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457 (1941). As that seminal decision reflects, a refusal to deal that forces a recalcitrant insurer to conform its practices to private industry rules is no less an act of coercion or intimidation because victims who fall into line are treated the same as the instigators of the boycott. See also *Eastern States*, 234 U.S. at 608. Indeed, the boycotters in *SEUA* did not discriminate against insurance companies who joined the association and followed its rules. By contrast, petitioners' approach would allow insurers to impose "private regulations" free of antitrust constraints, so long as the "enforcers" and their collaborators adhered to their own regulations.

e. Petitioners raise a false alarm by arguing (H. Br. 45-47) that unless their alleged agreements are held to be immune from the antitrust laws, no insurer will able to discuss terms of coverage with its reinsurer. The alleged boycott in this case does not involve discussions between primary insurers and reinsurers concerning the terms on which reinsurance will be available to *those*

primary insurers. It involves discussions about changing the terms available to *competitors* of those primary insurers. There is no reason to believe that Congress viewed such discussions as necessary to the welfare of the insurance industry.[18]

III. PRINCIPLES OF COMITY DO NOT REQUIRE DISMISSAL OF CLAIMS THAT LONDON-BASED FIRMS VIOLATED THE SHERMAN ACT BY AGREEING NOT TO SELL REINSURANCE TO CERTAIN PRIMARY INSURERS IN THE UNITED STATES

The petitioners in No. 91-1128 (the Merrett petitioners) contend that principles of comity require dismissal of three claims (Counts 5, 6, and 8 of the California complaint) alleging that U.K. firms trading in the Lloyd's of London and London Company markets agreed with unnamed co-conspirators to deny reinsurance to primary insurers in the United States until those primary insurers adopted the policy terms demanded by Hartford and its allies.[19] See J.A. 43-46, 47-49. We agree with petitioners that principles of comity may be invoked in antitrust cases, and that the *Timberlane* standard provides a useful formulation of the relevant factors. We believe, however, that the courts below misunderstood the criteria for determining whether there is a conflict between U.S. and foreign law, and therefore found a conflict where none exists. But even on its own premise, we agree with the court of appeals' conclusion that comity does not bar determination of respondents' claims by a U.S. court.

1. a. Both courts below held that the U.S. courts have subject matter jurisdiction over the disputed claims because the Merrett petitioners' alleged conduct had a "direct, substantial and reasonably foreseeable effect" on commerce within the U.S. or import trade in the U.S. Pet. App. 73a-75a, 27a-28a. That holding is correct.

The jurisdictional reach of the Sherman Act is extremely broad. See *Summit Health, Ltd.* v. *Pinhas*, 111 S. Ct. 1842, 1846 & nn.7-10 (1991). The Act expressly applies to acts "in restraint of trade or commerce * * * with foreign nations." 15 U.S.C. 1, 2. The enactment history indicates that Congress intended the Sherman Act to apply to restraints on import trade. See 21 Cong. Rec. 2456, 2461, 3152 (1890). Although an early decision of this Court suggested that the antitrust laws had no extraterritorial application, see *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 355-357 (1909), that aspect of *American Banana* has been "substantially overruled" by subsequent decisions. *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 407 (1990). See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 & n.6 (1986); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-705 (1962); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945).

In any event, the FTAIA, 15 U.S.C. 6a, makes it clear that jurisdiction under the Sherman Act extends to restraints of the sort alleged in this case.[20] By its

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[18] The Hartford petitioners also assert (H. Br. 47-48) that principles of federalism are implicated by finding a boycott in this case, because the States ultimately authorized the forms that Hartford favored. But Congress has determined that no State may authorize a boycott, see pp. 12-13, *supra*; that determination is not open to reconsideration by the courts.

[19] The respondents also allege that the London reinsurers conspired with U.S. primary insurers and reinsurers to deny reinsurance to U.S. primary insurers who declined to alter the terms of CGL insurance. J.A. 37-43. Petitioners do not raise a comity argument as to these claims.

[20] The FTAIA provides, in part, 15 U.S.C. 6a, :

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—

terms, the FTAIA does not apply to direct restraints on import commerce—the kind of restraints alleged here. It does, however, make the Sherman Act applicable to non-import restraints on our foreign commerce that have a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce. 15 U.S.C. 6a(1)(A). The FTAIA's enactment history shows that Congress considered the import trade to be vital and particularly deserving of the Sherman Act's protection. H.R. Rep. No. 686, 97th Cong., 2d Sess. 9-10 (1982). Thus, Congress certainly intended the jurisdictional threshold for import restraint cases to be no higher than the threshold for export restraint cases. See *U.S. Department of Justice Antitrust Enforcement Guidelines for International Operations* 30-31 (1988) (*DOJ Guidelines*). Because the alleged restraints plainly had a "direct, substantial, and reasonably foreseeable effect" on import trade, they are within the jurisdictional reach of the Sherman Act.[21]

b. In our view, a federal court may invoke principles of comity in an antitrust case even though the challenged conduct had a "direct, susbtantial, and reasonably foreseeable effect" on U.S. commerce. To be sure, neither the text nor the legislative history of the Sherman Act men-

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(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States.

[21] Sturge is the only petitioner that contends that "there is no jurisdiction over the claims against [its predecessor in interest] K.F. Alder." S. Br. 19. Respondents' complaint charges Alder with participating in a boycott of U.S. primary insurers' pollution policies covering U.S.-based claims. J.A. 32, 45-46. As both courts below concluded, the alleged conduct had a direct, substantial, and reasonably foreseeable effect on American commerce. Indeed, Sturge itself states (S. Br. 22) that the pollution coverage involved "astronomical cost."

tions comity. But the doctrine of comity was established (if not well defined) at the time the Sherman Act was passed. See *Hilton* v. *Guyot*, 159 U.S. 113 (1895). It is therefore reasonable to assume that Congress intended principles of comity to apply in appropriate cases involving foreign commerce. Moreover, the legislative history of the FTAIA is explicit on this point. The House Report states: "If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane Lumber Co.* v. *Bank of America.*" H.R. Rep. No. 686, *supra*, at 13.

c. We agree with the Ninth Circuit that the seven factors set out in that court's *Timberlane* test provide a useful framework for analyzing comity issues.[22] Although multi-factor balancing tests have some familiar disadvantages—they are often difficult to apply and may lead to unpredictable results—the Court has recognized the difficulties in "articulat[ing] specific rules to guide th[e] delicate task of adjudicati[ng] comity issues." *Societe Nationale* v. *U.S. District Court*, 482 U.S. 522, 546 (1987). The comity inquiry must accommodate the legitimate interests of foreign nations, in the expectation that they will reciprocate and thus reduce the overall amount of friction in international litigation. *Id.* at 543-544; *id.* at 555 (Blackmun, J., concurring in part and dissenting in part). At the same time, a comity test should reflect the cardinal principle that "courts in the United

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[22] The seven *Timberlane* factors are: "[1] the degree of conflict with foreign law or policy, [2] the nationality or allegiance of the parties and the locations or principal places of business of corporations, [3] the extent to which enforcement by either state can be expected to achieve compliance, [4] the relative significance of effects on the United States as compared with those elsewhere, [5] the extent to which there is explicit purpose to harm or affect American commerce, [6] the foreseeability of such effect, and [7] the relative importance to the violations charged of conduct within the United States as compared with conduct abroad." *Timberlane*, 549 F.2d at 614.

States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U.S. at 409.

There is no shortage of legal standards that seek to reconcile these basic principles. In addition to the seven-factor test of *Timberlane*, there is the ten-factor test of *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1297-1298 (3d Cir. 1979), the six-factor test of the *DOJ Guidelines* at 32-33 n.170, and the eight-factor test of Section 403(2) of the Restatement (Third) of the Foreign Relations Law of the United States (1987). The tests overlap to a large degree. Although we continue to endorse the test set out in the *DOJ Guidelines*, we also believe that the seven *Timberlane* factors are a useful formulation of the relevant considerations.[23]

[23] The *DOJ Guidelines* factors and the *Timberlane* factors are substantially the same, with two exceptions: the *DOJ Guidelines* omit *Timberlane*'s consideration of enforcement compliance; and *Timberlane* omits the *DOJ Guidelines*' interest in "the existence of reasonable expectations that would be furthered or defeated by the action." We believe that enforcement compliance is a relevant factor that may properly be taken into account by a court.

We think that the *Mannington* test is flawed by its sixth factor: "Possible effect upon foreign relations if the court exercises jurisdiction and grants relief." *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d at 1297. In our view, this factor invites unwarranted judicial intrusion into the foreign policy domain of the political branches. We also disagree with two of the factors set out in Section 403(2) of the Restatement (Third) of the Foreign Relations Law of the United States: "(e) the importance of the regulation to the international political, legal or economic system [and] (f) the extent to which the regulation is consistent with the traditions of the international system." We believe that both criteria are exceptionally vague, invite inappropriate judicial involvement in foreign affairs, and may inject into comity analysis principles that are inconsistent with U.S. policy.

Finally, contrary to the British government's view (U.K. Br. 16-21), the warmth of our relations with a foreign nation should not be a factor in a judicial comity analysis. Courts are particularly ill-equipped to determine the state of our foreign relations with particular countries or governments. Such determinations might embarrass the President or burden the conduct of foreign relations.

Our endorsement of *Timberlane* is qualified in one important respect: We believe that courts should not engage in any comity analysis in antitrust actions brought by the United States. "[C]ourts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own." *Societe Nationale*, 482 U.S. at 552 (Blackmun, J., concurring in part and dissenting in part). In private antitrust litigation, the comity analysis must be undertaken by the courts if it is to be undertaken at all. But when the Executive Branch has determined that the interests of U.S. law enforcement outweigh any possible detriment to our foreign relations, separation of powers principles, as well as the Judiciary's own recognition of its limitations in matters of foreign affairs, point to the conclusion that an "American court cannot refuse to enforce a law its political branches have already determined is desirable and necessary." *Laker Airways Ltd.* v. *Sabena*, 731 F.2d 909, 949 (D.C. Cir. 1984) (emphasis omitted). See also *United States* v. *Baker Hughes, Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C. 1990), affirmed on other grounds, 908 F.2d 981 (D.C. Cir. 1990). Cf. *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404, 409 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984).

2. In applying the *Timberlane* test in this case, both courts below concluded that application of the U.S. antitrust laws would create a conflict with United Kingdom (U.K.) law. See Pet. App. 29a-30a, 77a-80a. That conclusion rests on a misunderstanding of the type of conflict that is relevant for purposes of comity analysis.

a. A "conflict" for purposes of comity analysis must be "a true conflict between domestic and foreign law." *Societe Nationale*, 482 U.S. at 555 (Blackmun, J., concurring in part and dissenting in part). Where there is no true conflict, there is less reason for a U.S. court to decline to exercise jurisdiction in a case that is other-

wise properly before it. We submit that a conflict for comity purposes exists if (1) a foreign government has directed the defendants to engage in the disputed conduct, or (2) the defendants could not have avoided engaging in the disputed conduct without frustrating clearly articulated policies of the foreign government.[24]

Measured by that standard, there is no conflict with U.K. law in this case. The Merrett petitioners do not contend that U.K. authorities directed them to boycott U.S. insurers for the purpose of coercing them to adopt the type of policies favored by competing primary insurers. Nor is there any indication that the Merrett petitioners would have frustrated clearly articulated policies of the U.K. if they had not engaged in such a boycott. Nor is a conflict shown by the U.K. government's general objection to applying U.S. antitrust laws to the conduct of its subjects in the U.K., even when such conduct substantially and adversely affects U.S. commerce. M. Br. 26-27; U.K. Br. 3-4.

Contrary to petitioners' contentions, the exercise of jurisdiction by U.S. courts in this case does not interfere with British regulation of Lloyd's or of British insurance markets generally. In support of their conflict argument, petitioners cite portions of the States' prayer for injunctive relief as evidence of an intent "to impose on petitioners a program drafted in San Francisco for the underwriting of reinsurance in London." M. Br. 25. That argument is premature. If respondents

[24] Although this Court has never expressly recognized a defense of foreign sovereign compulsion, we believe that it is appropriate to recognize such a defense in certain circumstances in which a foreign government directs conduct violating our antitrust laws. See *DOJ Guidelines* at 33-34. But no such defense should be available if the foreign government merely authorizes conduct violative of our laws, even if failure to engage in the conduct would frustrate clearly articulated policies of the foreign government. In our brief amicus curiae in *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), we argued that the defense of foreign sovereign compulsion should not apply in antitrust suits brought by the United States. See U.S. Br. 23-24.

prevail on the merits, the district court, applying comity principles, may well confine any relief awarded to monetary damages. In any event, the injunctive relief sought relates to all six counts of the complaints in which most of the Merrett petitioners are named as defendants, not just to the three counts that are the subject of this petition.

d. The lack of conflict is dispositive in this case. Neither petitioners nor their amici argue that in the absence of conflict the district court should refrain from exercising jurisdiction. Thus, there is no need for the Court to decide whether, if there were a significant conflict, other comity factors would outweigh it.[25]

In any event, we believe that the court of appeals correctly concluded that, even if there were a conflict, it would be outweighed by other relevant factors supporting the exercise of juirsdiction. Respondents allege that the Merrett petitioners specifically intended to affect U.S. import commerce, that such effects were foreseeable, and that petitioners in fact succeeded in substantially affecting U.S. commerce. See Pet. App. 31a-32a, 81a-82a. These factors weigh heavily in favor of the exercise of jurisdiction by U.S. courts. In addition, all the plaintiffs are located in the United States. Pet. App. 30a, 80a. The lower courts also determined that a judgment for damages could be enforced against petitioners' assets in the U.S., Pet. App. 31a, 81a, and the court of appeals properly noted the ability of U.S. courts to direct injunctive relief at defendants that are wholly owned by U.S. firms. Pet. App. 30a.[26]

[25] In addition, the Court need not address the far-reaching contention of the Government of Canada that U.S. courts may never hear a case involving the conduct of foreigners in their own country, no matter how great the impact on the U.S. economy, if to do so would create a conflict with the law of the foreign country. We strongly disagree with that contention. See *Laker Airways* v. *Sabena*, *supra*.

[26] Petitioners' claim that the court of appeals wrongly "imported" the FTAIA into its comity analysis (M. Br. 19-22) ignores the fact that the court engaged in a traditional *Timberlane* analysis.

2. Finally, contrary to the Merrett petitioners' contention (M. Br. 29-30), there is nothing anomalous in the fact that the U.S. insurance industry has a measure of antitrust immunity under the McCarran-Ferguson Act, while foreign reinsurers not subject to state regulation have no such immunity. In enacting McCarran-Ferguson, Congress relied on state regulation to protect U.S. consumers. There was no reason for Congress to assume that foreign governments, if they chose to regulate at all, would consider the interests of U.S. consumers. Accordingly, Congress left the Sherman Act in full force as to restraints on our import trade in insurance services that are not regulated by the States.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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